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No. 84-1076

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Appellant,

v.

THE STATE OIL AND GAS BOARD OF MISSISSIPPI AND COASTAL EXPLORATION, INC., *et al.*,
Appellees.

On Appeal from the Supreme Court of Mississippi

BRIEF AMICUS CURIAE OF ASSOCIATED GAS DISTRIBUTORS IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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ASSOCIATED GAS DISTRIBUTORS
MEMBER COMPANIES

Atlanta Gas Light Co.
Baltimore Gas & Electric Co.
Bay State Gas Co.
The Berkshire Gas Co.
Boston Gas Co.
The Brooklyn Union Gas Co.
Central Hudson Gas & Electric Corp.
Chesapeake Utilities Corp.
City of Holyoke, Mass., Gas & Electric Dept.
City of Norwich, Dept. of Public Utilities
City of Westfield Gas & Electric Light Dept.
Colonial Gas Co.
Commonwealth Gas Co.
Concord Natural Gas Corp.
Consolidated Edison Company of New York, Inc.
Delmarva Power & Light Co.
Elizabethtown Gas Co.
EnergyNorth, Inc.
Essex County Gas Co.
Fitchburg Gas & Electric Light Co.
Lynchburg Gas Co.
New Jersey Natural Gas Co.
New York State Electric & Gas Corp.
North Carolina Natural Gas Corp.
Northeast Georgia Municipal Gas Utilities
Northeast Utilities
Northern Utilities, Inc.
Pennsylvania Gas & Water Co.
Pequot Gas Co.
Philadelphia Electric Co.
Philadelphia Gas Works
Providence Gas Co.
Public Service Company of North Carolina, Inc.
Public Service Electric & Gas Co.
South County Gas Co.
South Jersey Gas Co.
The Southern Connecticut Gas Co.
UGI Corporation
Valley Gas Co.
Washington Gas Light Co.

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INTEREST OF AMICUS CURIAE

Associated Gas Distributors (AGD) is an unincorporated association whose members (listed on the inside cover of this brief) are gas distribution companies located along the eastern seaboard of the United States from New England through Georgia. Together, the AGD companies serve over eleven million customers, and their annual sales comprise approximately 25 percent of the gas sold through the nation's interstate gas supply network.

Each AGD member purchases its natural gas for resale from one or more of the major, regulated interstate gas pipeline companies, including the Transcontinental Gas Pipe Line Corporation (Transco), Appellant in this proceeding. A number of AGD members purchase a substantial portion of their gas supply from Transco; these AGD companies are directly affected by any increase in Transco's rates.

The purpose of the present brief amicus curiae is twofold. First, AGD seeks to emphasize the substantiality of the constitutional questions raised in this appeal by describing the historical and *continuous* federal preemption of the regulation of interstate gas pipeline companies. In particular, we note that at this very point in time, there exists an imminent possibility of collision between the Mississippi "ratable take" order, as affirmed by the Mississippi Supreme Court in its enforcement against Appellant, Transco, and a proceeding pending in the Federal Energy Regulatory Commission (FERC or Commission) to investigate that pipeline's purchasing practices.

The second purpose of AGD in submitting the present brief is to apprise the Court of the critical nature of this issue for consumers of natural gas nationwide who depend upon a comprehensive federal system of regulation of our nation's interstate gas pipeline network. As other states, including the larger, gas-producing states, begin to enforce "ratable-take" schemes against pipelines as does the Mississippi order challenged here, the consequences for the ultimate consumers, who absorb the increased costs and uncertainties that result therefrom, will be severe.

As public utilities, the members of AGD have an obligation to protect their customers against the payment of excessive and unlawful natural gas prices. Therefore, AGD has a substantial and direct interest in the outcome of this appeal. For this reason, AGD submits this brief amicus curiae in support of the Appellant.

CONSENT OF THE PARTIES

AGD has obtained the written consent of all the parties to this appeal for its filing of the present brief amicus curiae. The consent statements are attached to the original signed copy hereof filed with the Court.

SUMMARY OF ARGUMENT

I. In upholding the Mississippi Oil & Gas Board's order directing Transco to take gas ratably, the Mississippi Supreme Court held, in effect, that this Court's decision in *Northern Natural* is no longer good law as to purchases by interstate pipelines of gas whose price at the wellhead was deregulated by the Natural Gas Policy Act of 1978 (NGPA). Given that this Court rejected state regulation in this area even before the enactment of federal legislation governing interstate sales of natural gas, and that this Court relied specifically on the precedential value of *Northern Natural* in a case decided after the passage of the NGPA, the question of whether the court below misinterpreted the rationale of *Northern Natural*, in other words, whether state regulation of purchasing practices of interstate gas pipelines remains preempted by federal law, is substantial.

II. Under the Natural Gas Act of 1938 (NGA), the Federal Energy Regulatory Commission (FERC or Commission) (formerly the Federal Power Commission) was given the responsibility to regulate the purchasing practices of interstate pipeline companies. The Commission's exclusive jurisdiction over interstate pipelines was unaffected by passage of the NGPA. Proceedings to investigate the purchasing practices of pipelines which currently pend at the FERC demonstrate that the Commission is continuing to regulate in this area and, therefore, the intrusion of state regulatory agencies would be unlawful.

III. An illustration of the conflict, and potential for inconsistency, that would result from state regulation of

interstate pipeline purchasing practices is the pendency of a proceeding at the FERC to investigate the purchasing practices of Transco. It is conceivable that the Commission, pursuant to its NGA authority, will find Transco's compliance with the Mississippi ratable take order to be an unlawful purchasing practice under federal law. There exists the imminent possibility of collision between federal and state law; therefore, under this Court's interpretation of the doctrine of federal preemption, the state law must fall.

IV. In enacting the NGA and the NGPA, Congress charged the FERC with the fundamental responsibility of protecting the interests of the nation's gas consumers. Diverse, perhaps conflicting state regulation of the interstate pipeline network will ignore nationwide energy concerns, and will inhibit the ability of the FERC to fulfill its federal regulatory role.

ARGUMENT

I. THE QUESTION OF WHETHER THIS COURT'S DECISION IN THE *NORTHERN NATURAL* CASE WAS OVERRULED BY THE NATURAL GAS POLICY ACT OF 1978 IS SUBSTANTIAL.

In *Transcontinental Gas Pipe Line Corporation v. The State Oil & Gas Board of Mississippi and Coastal Exploration, Inc., et al.*, Brief for Appellant at Appendix A, the Mississippi Supreme Court was faced with the same issue that was decided by this Court in *Northern Natural Gas Co. v. State Corporation Commission*, 372 U.S. 84 (1963). Yet, in upholding the validity of the Mississippi Oil & Gas Board's "ratable take" order, the Mississippi court made the opposite decision. Whether the Mississippi Supreme Court's holding flouted a Supreme Court decision that continues to be good law after passage of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 *et seq.* (1982) is a substantial question which requires a determination by this Court.

Prior to any federal regulation of sales for resale, or "wholesale sales," of natural gas in interstate commerce, this Court refused to permit state regulation in the field on the ground that it imposed a direct burden on interstate commerce in violation of the Commerce Clause of the Constitution. *See, i.e., Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924). In enacting the Natural Gas Act, 15 U.S.C. § 717 (1982), the Congressional committee reports noted that such sales

> . . . have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. *The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act.*" H.R. Rep. No. 709, 75th Cong., 1st Sess. 1-2; S. Rep. No. 1162, 75th Cong., 1st Sess. 1-2 (citations omitted) (emphasis added).

Quoted in *Exxon Corp. v. Eagerton*, —— U.S. ——, 103 S. Ct. 2296, 2302-03 (1983). Thus, prior to any federal regulation—or deregulation—of the field, state regulation was considered inappropriate with regard to interstate sales of natural gas. The Natural Gas Act then was enacted to explicitly authorize federal regulation of the rates which a producer and a pipeline could charge their interstate customers on a standard of justness and reasonableness.

In 1963, this Court was presented with the question whether the State of Kansas was entitled to force an interstate pipeline company which purchased gas within the State to take ratably from all Kansas producers connected to its system. After first rejecting the State's argument that its ratable take order was directed to the "production and gathering" of natural gas, which is exempt from federal regulation under the NGA, the Court held the Kansas ratable take order invalid on the ground that it "invade[d] the exclusive jurisdiction which the Natural Gas Act has conferred upon the Federal Power Commission over the sale and transportation of natural gas in interstate commerce for resale." *Northern Natu-*

ral, 372 U.S. at 89. The Court stated that the federal regulatory scheme left no room for either direct or indirect state regulation of the prices of interstate wholesale sales of gas, *id.* at 91, and, more importantly for the purpose of these proceedings, that

> [t]he danger of interference with the federal regulatory scheme arises because these orders are unmistakably and unambiguously directed at *purchasers* who take gas in Kansas for resale after transportation in interstate commerce. In effect, these orders shift to the shoulders of interstate purchasers the burden of performing the complex task of balancing the output of thousands of natural gas wells within the State, cf. *Miller Bros. Co. v. Maryland*, 347 U.S. 340—a task which would otherwise presumably be the State Commission's. Moreover, any readjustment of purchasing patterns which such orders might require of purchasers who previously took unratably could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States. This relationship is a matter with respect to which Congress has given the Federal Power Commission paramount and exclusive authority. See *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 610.

Id. at 92. The language of this passage clearly indicates that the Court's basis for finding a federal regulatory scheme which preempted the state order was the federal regulation not simply of wellhead prices but of interstate pipeline-purchasers and their purchasing patterns, the readjustment of which could "seriously impair" the Commission's ability to regulate the pipelines' cost structures and sales to wholesale customers, i.e., distributors.

In 1978, Congress passed the Natural Gas Policy Act, 15 U.S.C. § 3301 *et seq.* (1982) (NGPA). The NGPA removed from FERC jurisdiction the regulation of well-

head prices of certain categories of gas, and restructured wellhead price regulation for the remaining categories. The NGPA did not affect the ongoing regulation of pipelines under the Natural Gas Act's just and reasonable standard.

In the present case, the Mississippi Supreme Court upheld the order of its State Oil & Gas Board directing Transco to take gas ratably from all producers in a common source of supply. The court acknowledged that if this case had been brought prior to 1978, it would have been bound by this Court's decision in *Northern Natural*, but that the key distinction between the two cases was the passage of the NGPA and the fact that the state ratable take order affected "deregulated gas." That its order was directed against an interstate pipeline which was *not* deregulated by the NGPA was not discussed.

Neither did the court acknowledge that in *Maryland v. Louisiana*, 451 U.S. 725 (1981), decided after the passage of the NGPA, this Court indicated that *Northern Natural* was still considered good law. In Maryland, the Court determined that a Louisiana "First Use" Tax on natural gas brought into the state, primarily, from the Outer Continental Shelf, which was borne by pipelines and then passed through to the ultimate consumer, "like the state Commission's order in *Northern Natural*," was "inconsistent with the federal scheme and must give way." *Id.* at 751. The Court relied heavily on *Northern Natural* for this determination, quoting the passage that described the state requirement as liable to " 'seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchaser's cost structures and eventual costs to wholesale customers who sell to consumers in other states.' " *Id.* at 750, quoting *Northern Natural*, 372 U.S. at 92.

Ironically, the Mississippi Supreme Court itself recognized that the fact that Congress had withdrawn federal regulation of wellhead pricing control did not end the

inquiry, for it quoted this Court's statement in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission* that

> a federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision *to* regulate.

—— U.S. ——, 103 S. Ct. 1905, 1912 (1983) (emphasis in original). Despite this statement, the court below gave no explanation, nor did it cite to a single specific authority or indicate that the legislative history was even consulted, for its conclusion that "what, and all, the Congress has done insofar as we are concerned is strip away federal regulatory authority thus leaving in effect and wholly exercisable such state regulatory authority as otherwise exists." Brief for Appellant, Appendix A at 29a. Neither did the court, in rejecting the argument that the ratable-take order violated the Commerce Clause, address the fact that this type of state regulation had been invalidated by the Supreme Court prior to any federal regulation in the area.

State authority to regulate interstate pipeline purchasing practices through measures such as ratable take orders has *never* existed, was specifically rejected by the Court in *Northern Natural* on grounds independent from those aspects of federal jurisdiction which were removed by the NGPA, and cannot exist today given the FERC's pervasive regulatory authority over the purchasing practices of interstate pipelines.

II. REGULATION OF INTERSTATE GAS PIPELINES, AS MANDATED BY THE NATURAL GAS ACT, CONTINUES TO BE THE RESPONSIBILITY OF THE FEDERAL GOVERNMENT.

The Federal Energy Regulatory Commission derives its authority to oversee and regulate the purchasing practices of the nation's interstate gas pipelines from several

sources in the Natural Gas Act of 1938 (NGA), 15 U.S.C. § 717 (1982). Furthermore, the Commission's responsibilities in this area were unaffected by passage of the NGPA in 1978.

The broadest basis of FERC jurisdiction over interstate pipelines is found in Section 1(b) of the NGA. 15 U.S.C. § 717. There, the Commission is given general authority over (a) the transportation of natural gas in interstate commerce, (b) the sale in interstate commerce of natural gas for resale, and (c) companies engaged in such transportation or sale.

Several substantive provisions of the NGA specifically authorize the federal regulation of pipeline purchasing practices. Section 4 of the NGA, 15 U.S.C. § 717(c), governs pipeline rate increase proceedings, during which "interested" parties (gas producers supplying the pipeline, pipeline customers and consumer representatives) may raise questions concerning the "justness and reasonableness" of the purchasing pattern under which that pipeline either acquired its gas supply in a past period or proposes to acquire gas in the future. The Commission may then respond to these complaints by making appropriate adjustments in the pipeline's approved cost of service.[1]

Under NGA Section 5, 15 U.S.C. § 717(d), the Commission has authority to adjudicate the justness and reasonableness of any pipeline "practice" which reflects the rates and charges of that pipeline. If any such practice is found to be unjust, unreasonable or unduly discriminatory, the Commission is required by Section 5 to "fix" the practice "to be thereafter observed." Presumably, this section could provide the basis for Commission action affecting a pipeline's gas purchasing practice in a manner inconsistent with state ratable take schemes.

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[1] *See, e.g.*, Columbia Gas Transmission Corp., Docket Nos. TA81-1-21, *et al.*, Opinion No. 204, 26 FERC ¶ 61,034 at 61,096 (January 16, 1984), *appeal docketed*, No. 84-1099 *et al.* (D.C. Cir.).

The continued vitality of the Commission's regulatory authority over the purchasing practices of interstate pipelines is evident in a series of cases currently pending at FERC which involve inquiries into the past purchasing practices of interstate pipelines. *See Panhandle Eastern Pipe Line Company*, Docket No. TA84-1-28-002, Order Establishing Hearing Procedures, 26 FERC ¶ 61,339 (March 16, 1984); *El Paso Natural Gas Company*, Docket No. RP82-33 *et al.*, Order on Rehearing Modifying Prior Orders, Consolidating Cases, and Setting Hearing, 26 FERC ¶ 61,366 (March 21, 1984); *MIGC, Inc.*, Docket No. RP84-15-000, Order Accepting Filing, Consolidating Proceedings and Setting Matters for Hearing, 26 FERC ¶ 61,369 (March 21, 1984); *Trunkline Gas Company*, Docket No. TA83-1-30-002 *et al.*, Order Setting Matter for Hearing and Consolidating Proceedings, 26 FERC ¶ 61,363 (March 21, 1984); *Southern Natural Gas Company*, Docket No. TA84-1-7-000 *et al.*, Order Consolidating Proceedings and Setting Matters for Hearing, 26 FERC ¶ 61,371 (March 21, 1984); *Transcontinental Gas Pipe Line Corp.*, Docket No. TA83-2-29-001 *et al.*, Order Establishing Hearing Procedures on Deferred Purchasing Practices Issues, 26 FERC ¶ 61,361 (March 21, 1984). Under the Commission's new hearing procedures for rate proceedings established in Opinion Nos. 204 and 204-A, *Columbia Gas Transmission Corporation*, Docket Nos. TA81-1-21, *et al.*, 26 FERC ¶ 61,034 (January 16, 1984), *appeal docketed*, No. 84-1099 *et al.* (D.C. Cir.), not only will the lawfulness of a pipeline's charged rates be judged by the NGPA considerations of fraud and abuse,[2] but parties will also be

[2] Prior to the NGPA's passage, the pipelines' ability to pass through costs of gas to the distributors was a function of the Commission's determination as to the justness and reasonableness of the proposed rates. Because the NGPA replaced the Commission's authority to determine wellhead prices as to certain gas with statutory "maximum lawful prices," the Commission was directed to deny passthrough of the wellhead cost of gas only where it

permitted to raise issues of "prudence," the traditional NGA Sections 4 and 5 measure of lawfulness, with regard to a pipeline's proposed rate increase. This opens up the possibility for a pipeline's purchase in conformity with a state ratable take scheme, and its resulting increased price of gas, to be deemed imprudent under federal standards and, therefore, unlawful.[3]

III. PROCEEDINGS CURRENTLY PENDING IN THE FEDERAL ENERGY REGULATORY COMMISSION ARE ON A COLLISION COURSE WITH THE MISSISSIPPI RATABLE-TAKE RULING.

The Federal Energy Regulatory Commission is currently conducting an investigation of the purchasing patterns and practices of Transco, the disposition of which could be directly contrary to, or inconsistent with Transco's obligation under the Mississippi ratable-take mandate.

On September 28, 1984, Transco tendered for filing its tariff sheets with the Commission seeking, among other things, a revision of the Purchased Gas Adjustment Clause contained in its FERC Gas Tariff. *Transcontinental Gas Pipe Line Corporation*, Docket Nos. TA85-1-27-000 and TA85-1-29-001. On October 12, 1984, AGD filed a Motion to Intervene and Protest in this proceeding, asserting that Transco had not demonstrated the justness and reasonableness of its proposed rate increase. AGD also raised several other important issues with regard to the purchasing practices of Transco. Specifically, AGD's motion stated that:

> AGD is aware that certain of Transco's gas supply agreements contain high percentage take-or-pay pro-

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"determines that the amount paid [by the pipeline] was excessive due to fraud, abuse or similar grounds." 15 U.S.C. § 3431(c)(2).

[3] The responsibility of the FERC to determine the legality of pipeline purchasing practices after passage of the NGPA was explained by FERC Chairman Raymond J. O'Connor in his letter of December 13, 1984 to Senator John Heinz.

> visions substantially identical to those contracts found "unjust and unreasonable" by the Commission's Opinion No. 204. AGD is particularly interested in the manner in which higher-priced contracts with high percentage take-or-pay provisions have affected, and will continue to affect, Transco's purchasing practices and cost of gas supply. Similarly, AGD is aware that Transco's November 1984-April 1985 purchase pattern will be influenced by a ruling of the Mississippi Oil & Gas Board in which Transco is required to accept deliveries on a "ratable take" basis from certain Mississippi supply sources. It is not clear that this pattern of Mississippi purchases satisfied the just and reasonable standard applicable to Transco's purchase pattern under Sections 4 and 5 of the Natural Gas Act nor is it clear that pro rata purchases of uncontrolled wellhead purchases are consistent with the lowest reasonable cost standard.

Motion of AGD to Intervene and Protest at 7.

In its *Order Accepting and Suspending Proposed Tariff Sheets Subject to Refund and Conditions*, issued in the Transco rate proceeding on October 31, 1984, the Commission responded to AGD's concerns by ordering a public hearing "concerning the lawfulness of Transco's proposed rates, *including purchasing practices issues.*" (Emphasis added.) Although the Commission did not specify, it is reasonable to infer that the "purchasing practices issues" to be explored in the public hearing will include, *inter alia*, the justness and reasonableness of Transco's purchasing practices as they have been directed by the Mississippi Oil & Gas Board's ratable take order. The Commission stated that it was entitled to make this inquiry pursuant to its authority under the Natural Gas Act, "particularly sections 4, 5, 8 and 15 thereof. . . ." *Id.*

If, after the public hearing and investigation, the Commission finds that Transco's compliance with the Missis-

sippi ratable-take order is unjust and unreasonable,[4] the pipeline will be in the position of necessarily violating either state or federal law. The FERC would have authority, furthermore, under the Natural Gas Act Sections 4 and 5 to order Transco to adhere in the future to a particular purchasing pattern which is inconsistent with the state ratable take scheme. As this Court reiterated in the post-NGPA *Maryland v. Louisiana* case, "[t]he FERC need not adjust its ruling to accommodate" the state statute. 451 U.S. at 725. The case law clearly directs that in such a situation of actual federal-state conflict, where "compliance with both federal and state regulations is a physical impossibility," the Supremacy Clause requires the state law to fall to the federal law. *Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission*, —— U.S. ——, 103 S. Ct. 1713, 1722 (1983), citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

Importantly, the doctrine of federal preemption does not apply only in cases of actual conflict between state and federal law. The attempted state regulation must fall in a situation where, "[a]t the very least, there is an imminent possibility of collision." *Maryland v. Louisiana*, 451 U.S. at 725, citing *Northern Natural*, 372 U.S. at 92. Therefore, given the "imminent possibility" of a FERC order directing Transco to change its purchasing pattern in a manner inconsistent with the Mississippi ratable-take scheme, this state regulation is preempted.

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[4] It is conceivable that the FERC will rule that Transco's purchases of Mississippi gas were "imprudent," i.e. that such purchases were inconsistent with Transco's duty to acquire gas at the lowest reasonable cost and that its purchase pattern should be adjusted to exclude some portion of the Mississippi production required to be taken under that state's Oil & Gas Board's order. *See Columbia Gas Transmission Corp., supra*, 26 FERC at 61,112.

IV. THE GROWTH OF DIVERGENT STATE REGULATION OF INTERSTATE PIPELINE PURCHASING PRACTICES STANDS AS A SIGNIFICANT THREAT TO THE INTERESTS OF THE NATION'S GAS CONSUMERS.

The fundamental responsibility of the Federal Energy Regulatory Commission is to protect the nation's gas consuming public against excessive rates and charges and to set policies which provide natural gas "at the lowest reasonable rate consistent with the maintenance of adequate service." *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 388 (1959). This protection is exactly what would be lost if the states were permitted to enter individually into the field of interstate pipeline regulation.

The Mississippi Supreme Court recognized the problem for consumers and described it thus:

> Transco has the right to pass the costs it incurs in purchasing natural gas through to the consumer. 15 U.S.C. § 3431(c). In this sense, it is not Transco who experiences a burden, it is the consumer. If higher purchasing prices at the wellhead lead to higher prices to the consumer and a loss of markets, this is simply one inevitable consequence of the free market policies of the era of deregulation with respect to which Transco is vested by the negative Commerce Clause with no right to complain.

Transcontinental Gas Pipe Line Corporation, Brief for Appellant, Appendix A at 38a. What the court did not mention, however, is that out-of-state consumers who are burdened by the additional costs of pipelines' compliance with state ratable take orders have no recourse against the producing state's regulations. The Mississippi Oil & Gas Board has neither the interest nor the responsibility to assess the impact of its ratable take order on the ultimate consumers in New York and New England of the gas purchased originally from its state's producers.

In fact, as Appellant noted, the Board expressly refused to consider evidence submitted on the interstate impact of its action. Brief for Appellant at 17. This is why comprehensive federal regulation is important. The question, put by this Court, is "whether state authority can practicably regulate a given area," *Northern Natural*, 372 U.S. at 84, citing *Federal Power Commission v. Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1, 19-20 (1961). In this situation, the states can not and will not consider national needs in regulation.

This problem takes on enormous proportions in light of the fact that other gas-producing states, including such heavy nationwide gas supply sources as Oklahoma and Texas, are following the lead of Mississippi and proposing to enforce ratable take obligations against interstate pipeline companies.[5] In addition to the universal insensitivity to national energy needs that would inevitably result, such state-by-state regulation over pipeline purchasing patterns would put impossible burdens on the FERC's ability to carry out its regulatory responsibilities. In a closely analogous case, this Court struck down a local airport anti-noise ordinance on federal preemption grounds, noting, *inter alia*, that if other localities followed with ordinances of their own, "it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air flow." *Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 639 (1973). Likewise, with conflicting state demands on a pipeline's purchasing pattern, the Commission would be unable to undertake any meaningful supervision of the pipelines, as it is statutorily bound to do.

This Court stated recently that

> the production and transmission of energy is an activity particularly likely to affect more than one

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[5] See Brief for Appellant at Appendices H, at 130a-135a, and I, at 136a-152a.

> State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by States can patently interfere with broader national interests.

Arkansas Electric Cooperative Corp. v. Arkansas Public Commission, —— U.S. ——, 103 S. Ct. 1905, 1908-09 (1983). In deciding for the state regulatory scheme over the federal regulatory program, the Mississippi Supreme Court went so far as to assert that "the economic consequences of today's decision for one or more of the parties is of no significance, except insofar as the law has provided otherwise." Brief for Appellant, Appendix A at 17a. The law *has* provided otherwise by recognizing that as natural monopolies, interstate pipeline companies must be regulated, and that the Federal Energy Regulatory Commission, charged with this responsibility, is always bound to consider the economic consequences of its actions. *See, e.g., FPC v. Texaco, Inc.*, 417 U.S. 380, 399 (1974); *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 318 (1974); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).

CONCLUSION

For the foregoing reasons, AGD urges the Court to note probable jurisdiction in this case.

Respectfully submitted,

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